

THE JUDICIARY'S ROLE IN ECONOMIC PROSPERITY

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When people think of how courts affect them, they typically think in a public law mindset. They think about the “big issues” decided under constitutions. That type of judicial action dominates both public perception and legal scholarship. Thus, when people think about how courts affect them, they think more about hot-button political issues and the ubiquitously reported criminal cases. This slant toward thinking predominantly about public law is readily apparent in the multiple stories presently covering arrests and standard criminal trials and marquee constitutional litigation like the Indiana voter identification case of *Crawford v. Marion County Election Board*.¹

Private law often gets shunted to the back of people's minds because they think of it as solely affecting the parties. Far less coverage is given to tort or contract actions involving businesses or individual citizens in their economic lives. The Great Recession provides an excellent moment to consider the role of courts in the economy, because in truth, private law does have an effect beyond the parties. Businesses react to contract and tort cases. They often invest or not, innovate or not, based in part on how courts will treat them when deals go south or products fail.

Of course, courts touch the economy in non-adjudicative ways as well. Outside the courtroom, courts and judges can do their part to help promote an educated workforce and informed citizenry. Courts have the capacity to contribute to civic knowledge by webcasting their proceedings into college and secondary school classrooms, or contributing to civic education programs, or by just giving a local class a few moments of the judge's time.² There can be no doubt that a better-educated populace leads to a stronger economy. Courts must also do what they can to strengthen families because stronger families reduce crime, produce better educated citizens, and reduce poverty—all factors favorable to the economy. At a moment of sustained high unemployment, I will focus here on courts' impact on businesses and job creation.

Despite the attention given to public law, courts have always had a broader purpose than regulating how the government interacts with its people. Indeed, furthering commerce was a central goal of the early merchant courts established in the Middle Ages. When merchants in Florence desired to trade with makers of goods in Nice, they needed common rules of contract predictably enforced by courts that would ensure they would be paid.³ These merchant courts' focus on

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1. 553 U.S. 181 (2008).

2. See Randall T. Shepard, *Why the Courts Matter in Building a Strong Economy*, 36 IND. L. REV. 913, 913-14 (2003). For an excellent resource for civic education, see *The Democracy Lab*, ICIVICS.ORG, <http://www.icivics.org/> (last visited Aug. 11, 2011).

3. See Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RESOL. 240, 241 (1987); Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265, 270-73, 275 (2003).

commerce separated them from other courts of the era.

Merchants needed justice delivered swiftly, before goods perished or the rising tide kept them in port. To meet these needs, the merchant courts remained somewhat informal, with relaxed procedural rules which would have hindered commerce had they applied with full force.⁴ This informality allowed the courts to render swift decisions and keep the wheels of commerce turning. The law also developed a strong sense of equity among merchants. Merchants had some confidence that the courts would strive to treat all merchants equally under the law, allowing them to trade securely abroad.⁵

In the modern regulatory state, the law is completely interwoven with the economy, and business regulation has grown beyond merely settling disputes between feuding merchants, although settling contract disputes is still a core judicial function. The ubiquitous impact of legal rules on the economy was observable in Goldman Sachs's recent debacle involving the sale of privately-held stock in Facebook. After quietly approaching many of its top clients about purchasing Facebook stock, Goldman decided not to extend the opportunity to American investors and instead sold the stock to only foreign investors.⁶ The press had extensively publicized the Facebook transaction, and Goldman feared that the Securities and Exchange Commission (SEC) would view the news coverage as advertising, thus triggering reporting requirements and creating a potential for litigation. Observing this sequence of events, one commentator declared that "SEC regulation and the litigious atmosphere it fosters" are moving capital markets offshore, with a number of U.S. companies choosing to list their stocks only on foreign exchanges.⁷

While such dramas do not often make their way into public discourse, it can hardly be doubted that businesses regularly react to the legal environment around in them and vote with their feet when raising capital or creating new jobs. In his most recent State of the Union Address, President Barack Obama emphasized that the United States needs to stay competitive with up and comers like China and India.⁸ He made multiple recommendations to Congress about how to accomplish that goal.⁹ While the nation ponders government's role in the economy, it would be good for lawyers and judges to reflect on what courts can do to keep our economy competitive.

Every year the U.S. Chamber Institute for Legal Reform, an affiliate of the

4. 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 537 (7th ed. 1956); Trakman, *supra* note 3, at 274-76.

5. Trakman, *supra* note 3, at 272-73.

6. See Liz Rappaport et al., *Goldman Limits Facebook Offering*, WALL ST. J. (Jan. 18, 2011), <http://online.wsj.com/article/SB10001424052748703396604576087941210274036.html>.

7. Jonathan Macey, *The SEC's Facebook Fiasco*, WALL ST. J. (Jan. 20, 2011), <http://online.wsj.com/article/SB10001424052748703954004576089840802830596.html>.

8. Barack Obama, President of the United States, Remarks by the President in the State of Union Address (Jan. 25, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

9. *Id.*

U.S. Chamber of Commerce, ponders this question when it releases a report ranking the business climate associated with various state judiciaries. The aim of the analysis is to “quantify how corporate attorneys view the state systems.”¹⁰ The study gives each state an overall ranking and then ranks the states in ten different categories.¹¹ The Chamber Institute surveys “in-house general counsel, senior litigators or attorneys, and other senior executives at companies with at least \$100 million in annual revenues.”¹²

When asked “[h]ow likely would you say it is that the litigation environment in a state could affect an important business decision at your company such as where to locate or do business,” 67% of respondents stated “very likely” or “somewhat likely.”¹³ This response is important because “locat[ing] or do[ing] business” could mean whether a business stays in Illinois or moves to Indiana. It could determine whether a business stays in Indiana or moves to India. “[I]mportant decisions” could also include whether to hold on to capital to pay for future lawsuits or whether to use that capital to expand and create more jobs.

All this raises the question, “What can courts do to aid job creation and retention?” There are three things that courts can do without overstepping their limited role in popular governance. First, courts must aspire to treat similar cases alike by using clear and predictable rules in tort and contract law. Second, courts must be impartial and treat all litigants alike whether they are corporations or individuals. Third, the judiciary must strive to resolve disputes quickly and without undue expense.

There are respectable principles for approaching all sorts of litigation involving any citizens, but they impact economic enterprises in ways that affect all of us. It is no secret that companies will hesitate to innovate in the face of uncertain liability.¹⁴ Innovation is what drives economic growth, and thus drives job creation. When companies are unsure of the outcome, when a deal sours, or when companies fear uncertain liability in tort, they are less likely to consummate some deals and more likely to keep some new products from the market. Justice Holmes once said of the legal profession that

[p]eople want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the

10. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RANKING THE STATES: LAWSUIT CLIMATE 2010, at 2 (2010).

11. The ten categories are the overall treatment of tort and contract litigation; having and enforcing meaningful venue requirements; treatment of class action suits and mass consolidation suits; damages; timeliness of summary judgment or dismissal; discovery; scientific and technical evidence; judges’ impartiality; judges’ competence; and juries’ fairness. *Id.* at 14-16.

12. *Id.* at 2.

13. *Id.* at 8.

14. Larry D. Thompson & Charles J. Cooper, *The State of the Judiciary: A Corporate Prospective*, 95 GEO. L.J. 1107, 1118 (2007).

incidence of the public force through the instrumentality of the courts.¹⁵

And thus it is that predictability allows businesses to know what actions may get them haled into court and how much they will owe. When better able to predict the risk, enterprises can more effectively plan their affairs, allowing them to expand current initiatives and enter new markets.¹⁶ Predictability and reliability also assure businesses that their contracts will be enforced and their intellectual property protected.

Some corporations are concerned about disparate treatment of corporate and individual defendants.¹⁷ Just as courts must not favor the rich over the poor, they must not extract a higher sum from corporations than they do from individuals when faced with similarly injured plaintiffs. Differing jury verdicts also hamper predictability.¹⁸ Giving jurors all the tools they need to perform effectively is a partial antidote. How might lay jurors provide respectable outcomes when we hand them instructions like the one in *Travelers Indemnity Co. of America v. Jarrells*?¹⁹ In the *Jarrells* case, the instruction on accounting for collateral payments an injured plaintiff had received was impenetrable:

If you find that [plaintiff] . . . is entitled to recover, you shall consider evidence of payment made by some collateral source to compensate [plaintiff] . . . for damages resulting from the accident in question. In determining the amount of [plaintiff's] . . . damages, you must consider the following type of collateral source payments:

Payments for worker's compensation.

In determining the amount received by [plaintiff] . . . from collateral sources, you may consider any amount [plaintiff] . . . is required to repay to a collateral source and the cost to [plaintiff] . . . of collateral benefits received. [Plaintiff] . . . may not recover more than once for any item of loss sustained.²⁰

This instruction was given in a worker's compensation case after the injured plaintiff had already received payment from the insurance company. With this instruction, it was plausible that the jury deducted the amount the insurer had already paid the plaintiff. It was also plausible that the jury calculated the damages figure assuming that the insurer would then be repaid out of that

15. Oliver Wendell Holmes, Justice, Supreme Judicial Court of Mass., *The Path of the Law*, Address at the UC Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 457 (1896).

16. See Thompson & Cooper, *supra* note 14, at 1115.

17. See *id.* at 1117.

18. *Id.*

19. 927 N.E.2d 374 (Ind. 2010).

20. *Id.* at 377.

amount.²¹ Such ambiguous jury instructions and the resulting ambiguous verdicts make planning for potential liability difficult. A small but useful contribution to more accurate verdicts in this field of law, the Indiana Supreme Court virtually announced a new jury instruction.²²

Like the merchant courts of old, modern courts can help job growth by resolving disputes quickly. Prompt resolution helps the economy in a number of ways. Faster judgments allow businesses to get paid faster after a purchaser fails to pay the agreed-upon price for the widgets it purchased. Proper use of summary judgment and Rule 12 dismissals can save both time and costs. Matters in litigation get resolved quicker, clearing up uncertainties regarding liability and saving the money required to take matters to trial unnecessarily.

As we reflect on what courts can do to improve job creation, it is also appropriate to reflect on what our courts already contribute to “the largest, most prosperous economy in the world.”²³ A recent commentator declared that our court system is a “century level advantage[.]” that we have over even fast-growing economies like those of India and China.²⁴ We should not take for granted our “two-century plus track record of an independent judiciary.”²⁵ Bradford L. Smith, Microsoft’s general counsel, has firsthand experience dealing with judiciaries around the world.²⁶ In an address at the Conference on the State of the Judiciary, aptly named *Our Courts and Corporate Citizenship* and sponsored by the Sandra Day O’Connor Project on the State Judiciary, Smith recounted stories from foreign courts of witnesses being thrown out of courthouses by defendants, lawyers being beaten at settlement meetings, police and court officers losing or destroying evidence before trial, and “justice” being purchased for \$1000.²⁷ These problems make business transactions difficult and fortunately are unthinkable in the United States.

Smith also recounted the slowness of many foreign courts. In India, it generally takes twelve to fifteen years from the time an intellectual property case is filed until a trial court judgment is obtained.²⁸ Over the course of a decade, Microsoft filed more than seventy-five cases in India. At the end of that decade, only one of those cases had reached judgment in the trial court, and that case was

21. *Id.*

22. *Id.* at 378-79.

23. Obama, *supra* note 8.

24. Randall T. Shepard, Chief Justice of Ind., *Burdened but Unbowed*, State of the Judiciary Address 6 (Jan. 12, 2011), *available at* <http://www.in.gov/judiciary/supreme/stjud/2011.pdf> (citation omitted).

25. Bradford L. Smith, Senior Vice President, General Counsel, & Corporate Secretary, Microsoft Corp., *Our Courts and Corporate Citizenship*, Address at the Conference on the State of the Judiciary (Oct. 2, 2010), *available at* <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=621>.

26. In a twelve-month period ending in October 2008, Microsoft filed roughly 4100 lawsuits in just under seventy countries. *Id.*

27. *Id.*

28. *Id.*

still on appeal.²⁹

Our courts contribute significantly to our economic growth, especially when compared to legal systems worldwide. Beyond the judiciary's contribution to economic and political stability, we must focus on what courts can do to foster job creation. The answer is that courts must do what they do better, especially in hard economic times. Courts must maintain their independence and impartiality. They must lay down the clearest rules possible and then follow them in a predictable way so that businesses can plan their affairs. Courts must act quickly and diligently to resolve disputes. After all, courts do in fact change economic behavior, and thus, courts must be sure to do their part to work with the other two branches—within the limits of the judicial role—to help build a more prosperous society.

29. *Id.*